Supreme Court of the United States

OCTOBER TERM, 1940.

No. 227

LAND OBEROESTERREICH,

Petitioner,

vs.

WALTER E. GUDE and A. SPOTSWOOD CAMPBELL, as Executors of the Estate of EDWARD C. GUDE, deceased; ROBERT C. WINMILL, XAVIER M. AUDIBERT, FREDERICK F. ALEXANDRE, JOHN A. MORRIS, PAUL L. HUGHES, J. P. HOGUET, PAUL PRYIBIL and SHERBURNE PRESCOTT, co-partners doing business as stockbrokers under the firm name and style of GUDE, WINMILL & CO.,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

SAMUEL R. WACHTELL,
Counsel for Petitioner,
Land Oberoesterreich.

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Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Land Oberoesterreich, petitioner, by Samuel R. Wachtell, attorney and counselor, prays that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Second Circuit (R. 802) made in the above-entitled action on the 11th day of April, 1940, modifying the judgment of the United States District Court for the Southern District of New York (R. 114), entered the 7th day of March, 1939, so as to provide for a recomputation of plaintiff's damages in accordance with the opinion of the Court (R. 778) without costs of the appeals to either party *and except as so modified affirming the said judgment and order* of the said District Court, in which the plaintiff was awarded only the sum of $3,304.39 with interest, plus three certain bonds, and the order of the said District Court, made the 16th day of March, 1939 (R. 769), reaffirming the said judgment.

Prior Proceedings.

There have been two trials. On the first trial petitioner was awarded judgment in the sum of $76,837.54, plus the three bonds mentioned above. This judgment was reversed by the Circuit Court of Appeals for the Second Circuit by decree made on the 29th day of December, 1936, and a new trial was ordered unless the plaintiff filed a stipulation to reduce the judgment to $3,304.39, plus interest, plus the three bonds mentioned (86 Fed. [2d] 621). The petitioner applied to this Court for a writ of certiorari which was denied (300 U. S. 663, 57 S. Ct. 493).

The petitioner did not file a stipulation and a new trial was had.

Upon this second trial judgment was awarded to the petitioner for the sum of $3,304.39 with interest, plus the three bonds (R. 114), the District Court holding that it was bound by the opinion of the Court on the first trial that there was no conversion of the plaintiff's bonds by the defendants (R. 754). This judgment the Circuit Court of Appeals for the Second Circuit affirmed except that it ordered a recomputation of the plaintiff's damages to the extent mentioned in the opinion. The memorandum of the District Court on the trial will be found on pages 753 to 755 of the record, and the memorandum of the District Judge on the motion for reargument will be found on pages 756 to 758 of the record. The opinion of the Circuit Court of Appeals on the second appeal will be found on pages 778 to 785 of the record. It is reported in 100 Fed. (2d) 635. The Circuit Court of Appeals did not write any opinion in denying petitioner's petition for a re-hearing. Its decision will be found on page 801 of the record.

Jurisdiction.

The opinion of the Circuit Court of Appeals was rendered on the 13th day of February, 1940, and the petition for a rehearing was denied on April 10, 1940. The order for the mandate was entered on the 11th day of April, 1940.

The jurisdiction of this Court is invoked under Section 204(a) of the Judicial Code as amended by the Act of Congress of February 13, 1925 (United States Code, Title 28, Sec. 347). The ground upon which this petition is based is that the Circuit Court of Appeals and the District Court failed to apply the local law to the questions which arose upon the trial of this action, and in fact decided this case in a manner and on principles directly opposed to such local law.

Except for directions for mathematical computation, the decision of the Circuit Court of Appeals is final (R. 784-785).

Questions Presented.

(These questions were raised and argued by counsel before the Circuit Court of Appeals and in the District Court.)

1. Did the verbiage on the confirmation slips which were mailed to Alma's office but not seen by Alma become part of the contract of pledge between Alma and the defendants?

2. If the answer to the preceding question is in the affirmative, did the confirmation slips give the defendants the right to sell petitioner's securities "over-the-counter", or, on the Stock Exchange in the manner shown by the record?

3. Could the defendants rely upon the creation of any new right or the enlargement of an old right in respect of plaintiff's securities upon anything done or omitted by Alma (the embezzler) after they got notice of the petitioner's ownership of these bonds?

4. Would the failure of the petitioner to insist that the defendants should perform their pledge agreement with Alma constitute a waiver of such agreement by the petitioner when the petitioner had no knowledge of such pledge agreement and no knowledge that the defendants were breaching the agreement?

Summary of the Facts.

Petitioner, a political subdivision of the former government of Austria (R. 761), issued and sold to the American public certain coupon bonds in 1925 and 1927 (R. 761, 762). One Hans B. Alma was instructed by the petitioner to repurchase these bonds (with funds advanced by petitioner) in the open market for sinking fund and redemption purposes (R. 634-636). Alma agreed to be the custodian of the repurchased bonds without charge to furnish petitioner serial numbers of the bonds and places of deposit (R. 639, 640).

Without petitioner's knowledge or consent, Alma pledged these bonds with New York stockbrokers, including the defendants (R. 767), as margin on personal trading accounts. Upon discovery of the facts, petitioner gave notice to the defendants on March 12, 1932, that the bonds were its property (R. 339, 30-33), objected to any further sale thereof (R. 339) and offered to negotiate an agreement for the redemption of the stockbrokers' liens (R. 368, 369, 376). Defendants refused to recognize petitioner's title to these bonds and refused to enter into the proffered agreement for the liquidation of Alma's debit balance (R. 376, 34-35).

This they claimed to be entitled to do under their agreement with Alma (R. 340, 372).

Alma's original agreement contained no permission to sell without notice of the time and place or at private sale (R. 58, 59, 76). During the existence of the relationship, the usual confirmation slips sent to all the firm's customers was also mailed to Alma whenever they executed any transaction for him (R. 312). About sixty confirmation slips in all were sent from the time Alma opened his account until the petitioner gave notice of ownership of the bonds to the defendants. The confirmation slips contained the following verbiage (R. 722):

> "It is agreed between broker and customer * * * to allow the broker to close out any or all securities in the customer's account without advance notice to the customer * * *."

At the first trial there was no evidence whether Alma saw this verbiage. In its opinion of reversal at the first trial, the Circuit Court, reversing the District Court, held that the verbiage had become part of the contract. Upon the second trial, uncontradicted evidence was produced which established that Alma, who had a special agreement with the defendants, had never seen the slips or read the verbiage (R. 532, 533).

After notice of the petitioner's claim of ownership, the defendants, without notice either to Alma (R. 89, 100, 101) or to petitioner (R. 223) of the time and place, sold on the Stock Exchange (R. 319) and over-the-counter (R. 442, 443, 581), but not at public sale, all but three of the bonds. These sales petitioner made secretly, maintaining in a sworn counterclaim that petitioner's claim of ownership had prevented all further sale of any of the bonds (R. 14-19). This counterclaim was not withdrawn until after the bonds had been sold (R. 447-448).

The only notice defendants claim to have given to anyone that they intended to sell these bonds was a letter of April 22, 1932, addressed to Alma (R. 348, 747), which contained the threat that sales would be made on and after May 1st unless the debit balance should be covered. No time or place of sale was mentioned in the letter and the letter never reached Alma at New York (R. 537). It could not have reached Alma in Vienna in time. No copy of the letter was sent to the petitioner and petitioner was not informed that this letter had been sent.

Defendants' accountants sent a statement on April 30, 1932, to Alma's New York office showing the sale of a few of the bonds. This statement was signed and approved by a bookkeeper of Alma (R. 541, 734). The evidence at the second trial established that this bookkeeper was no longer in Alma's employ when he signed the statement (R. 540-542).

In its opinion of reversal at the first trial, the Circuit Court held that the practice which had been established between the defendants and Alma prior to the date when plaintiff notified defendants of its rights permitted the defend-

ants to sell the pledged securities thereafter in the manner set forth. On the second trial, the plaintiff proved (R. 521), and the defendants conceded (R. 268), that no forced sales had been had prior to the time when plaintiff gave notice of its rights to the defendants.

At the first trial, many of these bonds were still held by the public, but shortly thereafter petitioner redeemed all of its then outstanding bonds at par or over (R. 240).

The District Court upon the second trial held that the evidence at the second trial did not differ substantially from the evidence at the first trial, and that therefore "the decision of the Circuit Court of Appeals to the effect that there was no conversion is the law of the case." The District Court therefore gave judgment in accordance with the first decree of the Circuit Court.

Specifications of Error Petitioner Will Urge.

1. The Circuit Court and the District Court erred in holding that the verbiage on the confirmation slips became part of the contract between defendants and Alma.

2. Even if the verbiage on the confirmation slips became part of the contract between the defendants and Alma, nevertheless the Circuit Court and the District Court erred in holding that such language permitted a sale by the defendants of the pledged securities "over the counter" or on the Stock Exchange in the manner shown by the record.

3. The Circuit Court and the District Court erred in holding that the defendants could rely upon anything done or omitted by Alma after they had notice of petitioner's equities to amplify their rights under their agreement with Alma as it existed on March 12, 1932.

4. The Circuit Court erred in holding that the petitioner's failure to insist that the defendants perform their pledge agreement with Alma constituted a waiver of such agreement.

Reasons for Granting the Writ.

The present petition for a writ of certiorari is in many ways similar to that heretofore presented to this Court after the first appeal and denied (300 U. S. 663, 57 Sup. Ct. 493). At the time that the first petition was presented to the Court the decision of the Circuit Court on the first appeal granted a new trial. Although the fundamental questions of law remain the same, many new questions are now presented by the new evidence offered at the second trial and by the supervention of the opinion of this Court in *Erie R. Co.* v. *Thompkins*, 304 U. S. 64, 58 Sup. Ct. 817.

We do not know whether this Court refused certiorari after the first appeal because a new trial had been granted to the petitioner. We take the liberty of assuming that the right to the petitioner to have a new trial was in some measure responsible for this Court's denial of the application. But regardless of this, we submit that the new evidence requires a re-examination of the issues here.

Moreover, the supervention of the case of *Erie R. Co.* v. *Thompkins, supra*, requires a re-examination of the questions raised by the petitioner. At the time when the first appeal was heard, *Erie R. Co.* v. *Thompkins* had not yet been decided. At the second trial, the petitioner urged that the New York law was the only applicable law, and that for that reason the decision of the Circuit Court on the first appeal was not binding on the Trial Court on the second trial except to the extent to which it applied New York law. The Circuit Court on the second appeal recognized the force of *Erie* v. *Thompkins* and reversed itself on the question of the measure of damages. But in other respects the Circuit Court in both appeals departed radically from the laws of New York:

1. The decision of the Circuit Court, to the effect that the verbiage contained on confirmation slips is binding on a customer in the absence of evidence that he had read them (first appeal) and in the face of evidence that he had not read them (second appeal), is in direct conflict with the decisions of the Courts of the State of New York (*Thompson*

v. *Baily*, 220 N. Y. 471; *Heaphy* v. *Kerr*, 190 App. Div. 810, aff'd 232 N. Y. 526).

2. The decision of the Circuit Court to the effect that where a confirmation slip provides that the customer agrees "to allow the broker to close out any or all transactions in the customer's account without advance notice to the customer" permits the broker to sell the customer's securities "over the counter" or on the Stock Exchange in the manner shown by the record, is contrary to New York law (*Strong* v. *National Mechanics Banking Association*, 45 N. Y. 718, 720; *Wheeler* v. *Newbould*, 16 N. Y. 392).

3. The decision of the Circuit Court that the defendant's rights under its agreement with Alma as it existed on March 12, 1932, can be enlarged or extended as a result of anything done or omitted by Alma after the defendants had been notified of the petitioner's rights to the pledged securities is in conflict with the decisions of the courts of New York State (*Goshen National Bank* v. *Bingham*, 118 N. Y. 349; *LaMarchant* v. *Moore*, 151 N. Y. 209).

4. The decision of the Circuit Court that the failure of the plaintiff to insist that the defendants perform their pledge agreement with Alma constituted a waiver of such agreement, particularly where the petitioner had no knowledge of the pledge agreement and no knowledge that the defendant was breaching such agreement is in conflict with the law of New York (*Liston* v. *Hicks*, 243 App. Div. 159, aff'd 269 N. Y. 535; *Equitable Cooperative Foundry* v. *Hersee*, 103 N. Y. 25).

WHEREFORE, your petitioner respectfully prays that a writ of certiorari should be granted as prayed for.

Dated, July 9, 1940.

LAND OBEROESTERREICH,
By SAMUEL R. WACHTELL,
Attorney and Counsel for the Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Reference to the opinions of the Courts below and the grounds of jurisdiction as well as a statement of the case and specifications of error to be urged are contained in the petition.

Summary of Argument.

1. Language contained on a confirmation slip sent by a broker to his customer cannot be held as a matter of fact or law to have become part of the contract between the broker and his customer in the face of (a) failure of the broker to offer any evidence that the customer read the confirmation slips and understood that the verbiage referred to applied to him, and that he agreed to be bound thereby; (b) direct and specific evidence that the customer did not read the confirmation slips and did not see them; (c) evidence that the broker required the customer to sign an agreement at the time when the trading account was opened which did not contain the verbiage which appears on the confirmation slips; and (d) evidence that the confirmation slips were sent by the broker's employees to all its customers as a matter of routine (*Thompson* v. *Baily*, 229 N. Y. 471; *Heaphy* v. *Kerr*, 190 App. Div. 810, aff'd 232 N. Y. 526).

2. Where the agreement between the broker and his customer provides *only* that the broker may "close out any or all transactions in the customer's account without advance notice to the customer," the broker may not sell the customer's securities "over the counter" or on the Stock Exchange unless the sale is a public sale (*Strong* v. *National Mechanics Banking Association*, 45 N. Y. 718, 720; *Wheeler* v. *Newbould*, 16 N. Y. 392).

3. A broker must rely on the agreement as it existed between himself and his customer on the date when he received notice of a third party's claim of ownership to securities in the customer's account and notice that the customer embezzled such securities; he may not rely upon anything done or omitted by the customer to amplify the broker's rights under such agreement after notice of adverse title (*Goshen National Bank* v. *Bingham*, 118 N. Y. 349; *LaMarchant* v. *Moore*, 151 N. Y. 209).

4. The petitioner's failure to insist that the defendants perform their pledge agreement with Alma did not constitute a waiver of such agreement (*Liston* v. *Hicks*, 243 App. Div. 159, aff'd 269 N. Y. 535; *Equitable Cooperative Foundry* v. *Hersee*, 103 N. Y. 25).

ARGUMENT

POINT I

Under New York law the verbiage on the confirmation slips did not become part of the contract.

In *Thompson* v. *Baily*, 220 N. Y. 471, the Court held that, until assented to, the language on a confirmation slip does not constitute a contract; it merely constitutes "a proposal to enter into a contract." Before a confirmation slip can be deemed to have become part of the contract there must be an assent by the customer to be bound thereby (p. 477 of the Court's opinion). The Circuit Court of Appeals justifies the District Court's ruling that the confirmation slips became a part of the contract between Alma and the defendants by saying that "circumstances may be such that an assent to the offer may be inferred" (R. 781).

Even so, there must be evidence on which to rest the inference. But the record fails to show any such evidence. It shows instead that Alma never read or saw the confirmation slips (R. 532-533).

In *Heaphy* v. *Kerr,* 190 App. Div. 810 (aff'd 232 N. Y. 526), the customer denied that he had read any of the confirmation slips. Nevertheless, the Trial Court charged that the language on the confirmation slips was binding on the customer and must be held to be part of the contract.

In reversing, the Appellate Division of the First Department said:

> "No one has reason to expect that in the mere notice of the purchase of stock the broker is inveigling him into some further contract as to rights in collateral which he would not otherwise possess. * * * *With proof positive that he did not read them, and with no legal obligation to read them, there can be no implied consent to the making of a new contract by reason of his failure to express dissent therefrom.*" (Emphasis ours.)

On the second trial there was uncontradicted evidence that Alma had not read or seen the confirmation slips (R. 532-533).

POINT II

A. The verbiage on the confirmation slips is no consent to or waiver of a public sale.

B. The sales on the Stock Exchange were not public sales.

In the case of *Strong* v. *National Mechanics Banking Association,* 45 N. Y. 718, 720, the Court said:

> "Even if demand and notice could be dispensed with, a private sale in such a case cannot be sustained unless the parties have stipulated for such a sale."

Assuming they became part of the contract, the confirmation slips merely gave the defendants the right

> "* * * to close out any or all securities in the customers' account without advance notice to the customer * * *."

Nowhere in the margin card or in the confirmation slips will be found permission to defendants to sell at private sale.

Of the sales made by the defendants of plaintiff's bonds, 99 were sold "over the counter" (R. 581), the rest were sold on the Stock Exchange.

The bonds in question were listed on the "foreign inactive list" of the New York Stock Exchange (R. 430). Such bonds were sold by the broker who desired to sell them by filling out a card giving the name of the security, the price at which he was willing to sell, and the number of bonds available. The broker then would deposit this card in a filing cabinet known in the stock exchange parlance as a "can." In turn, any broker interested in buying bonds in the category mentioned would go to the "can" and look at the cards deposited there by the prospective sellers. If the prospective buyer was willing to buy at the price mentioned on the cards, he would get in touch with the seller's broker and the sale would be arranged (R. 430). There was not even a semblance of competitive bidding or public offering such as customarily prevails in connection with a sale on the floor of the Stock Exchange. A full explanation of the method of sale will be found on pages 500-502 of the record.

Such sales as well as the "over-the-counter" sales were not "public sales" in any sensible meaning of that phrase.

It appears therefore that all the sales of the plaintiff's bonds which were made by the defendants after March 12, 1932, were made at private sale.

On the first appeal, the Circuit Court found "a practice" between the defendants and Alma whereby sales on the Stock Exchange and "over the counter" was supposedly approved. This finding might conceivably be valid as to regular sales and purchases as to which all the confirmation slips had been furnished. It could not be valid as to *forced* sales because before the petitioner served notice and claim of title on the defendants, no forced sales had taken place. The record on the first trial did not clearly show whether or not there were any forced sales prior to the date when the plaintiff gave notice to the defendants. On the second trial, the plaintiff offered evidence to show that there were no forced sales prior to that time (R. 521), and, in fact, secured an admission

from the defendants' witness that all sales prior to the date of notice were on order by Alma (R. 268). But the Circuit Court on the second appeal disregarded this evidence and followed its first decision.

The Circuit Court virtually recognizes that these sales were not public but private, but attempts to justify them by saying:

> "* * * all sales were fairly made, in good faith, at prices currently prevailing in the New York market" (R. 782).

This is no justification under New York law. *Smith* v. *Sarin*, 141 N. Y. 315, 326-327; *Manning* v. *Heidelbach*, 153 App. Div. 790, 793-794.

POINT III

The New York law is that a broker must rely on the agreement as it existed between himself and his customer on the date when he received notice of a third party's claim of ownership.

In its reversal of the first decree the Circuit Court relied upon the letter of April 22, 1932, which the defendants had written to Alma and to which Alma did not object, and the accountant's statement of April 30, 1932, as an "amplification" and approval of the practice shown by the confirmation slips. The District Court on the second trial and the Circuit Court on the second appeal both held that they were bound by the opinion of the Circuit Court on the first appeal. We must therefore assume that though the Circuit Court does not specifically mention the letter of April 22, 1932, and the accountant's statement of April 30, 1932, these exhibits were given the same effect.

But this was contrary to the law which has been long established in New York, which is to the effect that even one receiving embezzled negotiable instruments innocently and in good faith may not enlarge his rights by transactions

with the embezzler after he has received notice from the rightful owners (*Goshen National Bank* v. *Bingham*, 118 N. Y. 349; *LaMarchant* v. *Moore*, 151 N. Y. 209).

POINT IV

The petitioner's failure to demand that defendants perform their agreement with Alma was not a waiver of any of the petitioner's rights.

In the second appeal the Circuit Court says:

> "We might also rest our decision upon another ground. When plaintiff served notice of its claim to ownership it did not request that defendant abide by the pledge agreement with Alma & Co."

The Court concludes that this was a waiver, though it does not state what petitioners had waived. We do not know whether the Circuit Court wished to rest its decision upon that ground or merely thought that it "might" rest it upon that ground if that were necessary. If the Court did rest its decision upon that ground it was wrong certainly under the law of the State of New York (*Liston* v. *Hicks*, 243 A. D. 159, aff'd 269 N. Y. 535; *Equitable Cooperative Foundry Co.* v. *Hersee*, 103 N. Y. 25).

This particular claim of waiver was never made by anyone. It was not mentioned in the first trial or in the first opinion of reversal or in the second trial. The Circuit Court mentions it for the first time on the second appeal.

The record fails to show the slightest basis for this holding. Instead the record shows that the defendants refused to make known the contract between themselves and Alma (see plaintiff's demand for a bill of particulars [R. 58] and defendant's reply to this [R. 59 and 76]). They carefully concealed from petitioner the claim that under an agreement with Alma they had the right to sell without notice or at

private sale. Nor is there anything in the record to the effect that the petitioner "chose to demand unequivocal and immediate return of all the pledged bonds."

The defendants were merely requested that the bonds should not be sold in view of the claim of title. The written notices stated:

> "Dr. Prossinagg comes here with a view to settling these questions with due consideration of the equities involved. We feel that no substantial interest can be affected by leaving the matter in statu quo until he arrives" (R. 30).

The only thing petitioner did was to ask the defendants to join a common agreement accepted by the other stock-brokers (R. 368).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated July 9, 1940.

Respectfully submitted,

SAMUEL R. WACHTELL,
Counsel for Petitioner,
Land Oberoesterreich.

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Dated: August 22, 1940.

A. SPOTSWOOD CAMPBELL,
Attorney for Respondents.

KARL T. FREDERICK,
Counsel.

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement

As was said by the Circuit Court of Appeals: "This controversy has been long in our courts." It has already been before this court upon substantially identical facts (R. 753) on application for writ of certiorari, following the first trial and appeal. (Cert. denied 300 U. S. 663)

The plaintiff had judgment at the first trial. Upon appeal, the Circuit Court of Appeals reversed and di-

rected a new trial. (86 F. (2) 621) Plaintiff applied for a rehearing which was denied. (1st Record 485) Plaintiff then applied for a writ of certiorari, which was denied as above stated.

At the second trial plaintiff had judgment only for a small surplus in defendants' hands, which it might have taken without more ado after the first appeal. (R. 753-755) After the trial court's decision, plaintiff applied for a reargument (R. 756-758)

Plaintiff then appealed to the Circuit Court of Appeals which affirmed with a trifling modification. (R. 778-785)

Plaintiff then applied for a rehearing, which was denied (R. 801), and now applies to this court for a writ. Five Circuit Judges as well as Judge Patterson, who shortly thereafter became a Circuit Judge, have examined plaintiff's claims. Three of the four "Questions" presented by plaintiff (Petition p. 3) were raised upon the first application for a writ.

Facts

The summary of "Facts" contained in plaintiff's petition (pp. 4-6) requires correction in respect to several misstatements, as well as some amplification. Whether the alleged points of law, which plaintiff advances as grounds for the granting of a writ, are actually involved in this case, or whether they exist only in the mind of plaintiff's counsel, will require an examination of the evidence and a basic determination as to whether the findings of fact of the trial court were correct or not. At least three out of the four propositions of the petitioner are founded upon a conception of the facts which differs

radically from the findings of the Trial Judge. (The case was tried without a jury.)

The action is for the alleged conversion of certain negotiable (bearer) bonds, constituting part of two much larger issues, which, along with other securities not here involved, had been pledged to defendants (stockbrokers), who received them in good faith from and as collateral to the account of Alma & Co. Plaintiff claims that it was the real owner and that Alma had no right to pledge them.

On March 12, 1932, plaintiff communicated with defendants saying that the bonds were its property. In successive notices plaintiff denied all rights on the part of defendants and demanded delivery of all the bonds without payment of the debt which they secured. Plaintiff also threatened to stop payment of all interest on them and virtually to destroy their value as collateral. (R. 30-35) When defendants refused to comply and proceeded with their sale, plaintiff commenced suit. (April 29, 1932, R. 1)

The original complaint stated a claim for *Replevin,* apparently on the theory of the demands above referred to, that plaintiff could "stick" the defendants for the $60,000 or more due them. This was later amended to state an action for *Conversion* (R. 4, 22), the alleged wrong being that defendants had not given *notice of sale.* (R. 26) At the second trial (some six years later) plaintiff amended the complaint to allege that defendants did not sell the bonds "*at public sale.*" (R. 160)

At the time the account was opened Alma signed the usual Customers Card. (R. 716, 717, Finding 17, R. 763) In so far as this was contractual, it permitted repledge of securities and instructed defendants to send notices to Vienna as well as to the New York office of Alma & Co.

Thereafter numerous transactions took place and after each a report or confirmation was mailed to Alma & Co.

in New York and also in Vienna. Each of these bore a printed statement to the effect that it was agreed between the broker and customer that the account might be closed out *without notice* if it became insufficiently margined. At least 124 transactions took place before plaintiff notified defendants of its claim and that number of reports were sent to Alma in New York and a similar number to Vienna, making 248 in all. (Petitioner's brief p. 4 wrongly states that there were "about sixty.") No objection was ever made to this contractual provision by Alma who was an experienced trader. (Findings 16, 19, 20, 21, R. 763, 764. See also R. 722-733, 285)

Petitioner rather quaintly refers to the language on these reports as "verbiage." ("Verbiage—The use of many words with little sense; verbosity; wordiness"—Websters' Dictionary) Petitioner also says (p. 5): "Uncontradicted evidence * * * established that Alma * * * had never seen the slips or read the verbiage." The evidence referred to is that of Volk who was an employee at the New York office. It reads: "Q. Do you know if he (Alma) ever saw them? A. I don't know whether he ever saw them * * *" (R. 533) The proposition that "I don't know" is "evidence * * * which established that Alma * * * had never seen the slips or read the verbiage" is fantastic. Nevertheless, that proposition is the keystone of Petitioner's Question No. 1. (Petition p. 3)

About April 1931 the account got into difficulties because the banks refused longer to take the bonds (which formed a major part of the collateral) in bank loans. (R. 298, 299, Finding 23, R. 765) From then on for almost a year the defendants delayed liquidation. They urged Alma strongly, however, to reduce the account and to

provide cash or additional security. Alma did all of these in some degree. Practically all other securities were sold, some money was paid in and some further security was deposited. (Findings 24, 25, R. 765, see also R. 262, 69-72)

Alma himself was in Vienna. It now appears that he discussed the situation with the plaintiff and explained his difficulties. The plaintiff, in spite of exchange difficulties, sent at least $100,000 to New York where it distributed it among the brokers and banks as, apparently, it thought the money would do the most good. (R. 221, 222) It also sent representatives to try to straighten things out. (R. 223) It never, however, revealed itself to the defendants or asserted any claim of any sort until March 12, 1932. (R. 339, Finding 15, R. 763)

During January, February and early March 1932, defendants increasingly urged Alma to clean up or properly secure the account. (R. 336, 337, Finding 25, R. 765) Finally, during the first week of March, defendants telephoned Alma's agent Volk (R. 201, Finding 27, R. 765) and stated that they would be obliged to sell the bonds "when and where" they could. The evidence reads as follows: (R. 337, Finding 28, R. 765, 766)

> "About the end of the first week in March, when no cash had been forthcoming, the debit balance not being reduced, I called Mr. Volk on the phone and I said: 'Mr. Volk, can you get any more margin? We must have more margin. We must have that debit balance reduced.' He replied: 'I am trying to get the margin' and I said: 'Mr. Volk, we must get it.' I said: 'Mr. Volk, I am going to start selling those bonds. Can you get the margin?' He said: 'No, I cannot.' I said: 'Well then I am going to sell the bonds when and where I can at the best prices I can with due regard for the interests of Alma & Co. and

> endeavor to get the best prices possible.' He said: 'That is about all I can do. I can't get any more margin and I appreciate your courteous treatment.' "

Volk substantially corroborated this testimony. (R. 535)

> "Q. What happened in March, 1932, when Gude, Winmill began to sell the bonds? Did Mr. Morris telephone you?
>
> A. He did.
>
> Q. During the month of March?
>
> A. That is right.
>
> Q. Do you recall the conversation you had at that time?
>
> A. Well, I remember that we had various telephone conversations before then, but *there was a day when he called up and said he could not wait longer; he would have to sell now,* and that he would suggest to sell at a certain price and very cautiously, that he would not overrun the market with that certain security but that he would have to begin now."

Morris' conversation constituted clear notice that defendants proposed to sell *where they could.* That obviously meant *at public or private sale, on the Exchange or "over the counter"* as they could find buyers. Alma & Co. offered no objection, but, on the contrary, Volk's response clearly constituted acquiescence. (Findings 28, 36, 37, 38, R. 765-767)

All of the above took place before March 12, 1932, when the defendants first heard of plaintiff's claim of title. (Finding 28, R. 765) Before defendants received notice of such claim, they sold eight of such bonds. (R. 339, 340, Finding 30, R. 766) These are the items shown

on the ledger (R. 73) under dates of March 11th and 14th when the sales were cleared. (R. 282) Every one of these eight bonds were sold at forced sale. "Permission to sell" was not asked in any case. Each one of these sales was reported to Alma & Co. which never made objection thereto. (R. 306, 352) And all of these sales were made before defendants received a communication of any sort from the plaintiff. (R. 340, Finding 30, R. 766)

The foregoing shows the inaccuracy of plaintiff's statement (Petition p. 5) that "the only notice defendants claim to have given to anyone that they intended to sell these bonds was a letter of April 22, 1932, addressed to Alma."

This recital also shows that factual foundation is lacking for Petitioner's Questions No. 2 and No. 3. (Petition p. 3)

On March 12, 1932, plaintiff notified defendants that it claimed title to the bonds. This was followed by several written communications. (R. 30-35) The relation of these facts to Petitioner's Question No. 4 (Petition p. 3) will be later pointed out.

POINT I

The language printed on the "confirmation slip" formed part of the contract between Alma & Co. and defendants.

The language in question may be found in Finding 20. (R. 764) It was sent to Alma & Co. after every purchase or sale. It was sent 195 times to the New York office and 195 times to the Vienna office. The language provided for *sale without notice*. No objection was ever

made to it. (R. 306, 352) Plaintiff's statement (Petition pp. 10, 11) that the evidence showed that Alma never read or saw these slips is untrue (R. 533, see *supra* on p. 4) and there is a clear statement that Alma's New York agent, Volk, saw them. (R. 532)

There was clearly an established "course of business" within the meaning of *Thompson* v. *Baily*, 220 N. Y. 471.

These "confirmation slips" were proper and admissible evidence of an agreement. *Smith* v. *Craig*, 211 N. Y. 456; *Keller* v. *Halsey*, 202 N. Y. 588. Silence or absence of objection on the part of Alma & Co. after a reasonable time is evidence of assent. *Thompson* v. *Baily* (*supra*). Alma & Co. were experienced traders in the New York market and knew the usual methods and practices of stock brokers in New York. (Finding 16, R. 763) See *Mayer* v. *Monzo*, 221 N. Y. 442, 447. If the trial court had made a finding that the provisions of the confirmation slips were not part of the contract, such finding would have been erroneous because without any evidence to support it. The case of *Heaphy* v. *Kerr*, 190 A. D. 810, cited by the plaintiff (Petition p. 11) is obviously inapplicable.

Plaintiff's Point I is not only founded upon an untrue statement of the evidence but is without merit.

POINT II

The defendants had the right to sell at either public or private sale.

We are here answering Petitioner's Points II and III. (Petition pp. 11-14) As in all its other arguments, plaintiff here again asserts that the courts below were all wrong on the facts. To ascertain whether there is any

merit in the (alleged) points of law advanced by the petitioner, this court must first re-examine the facts and reverse the findings at many points. The Supreme Court has generally declined to undertake that task, especially where no great public interest was at stake. (*Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508; *Hallenbeck* v. *Leinert*, 295 U. S. 116, 119)

Petitioner says (Point II) that the sales were not "public." It further says that the *confirmation slips* did not permit any other type of sale. This point of "public" as against "private" sales was formally introduced into the complaint by amendment at the second trial (R. 160) some six years after the suit was commenced although plaintiff had more or less to say about it, as well as other matters outside the pleadings, during the course of the first appeal. Plaintiff now says in effect that the findings of the trial court 28, 34, 35, 36, 37 and 38 (R. 765-767) were erroneous and should be corrected.

The petitioner represents that the right to sell at other than "public" sale was dependent upon the language of the "confirmation slips." This is a misrepresentation. Neither the defendants nor the court below have ever rested upon any such proposition. The right stemmed from other sources, which petitioner ignores for understandable reasons.

Of course, no one could well object to a sale on the Stock Exchange since that was the regular market which had been established by the plaintiff itself (R. 738) and which was used also by Alma. (See *Weir* v. *Dwyer*, 62 Misc. (N. Y.) 7, 12.) Some of the bonds, however, were sold "over the counter" (*i. e.* at private sale). Both types of sale were within the rights of the defendants. Before March 10, 1932, defendants asserted to Alma & Co. their intention of selling "*when and where*" they

could. They already had the right to sell without notice. Alma & Co. acquiesced and concurred in this program as we have already pointed out in discussing the facts (*supra* pp. 5, 6) and as the trial court found in the findings cited above.

Eight bonds were sold at forced sale after this agreement and before plaintiff notified defendants of its claim on March 12, 1932. Later it put its "position down in writing." (R. 346, 746, 747) No objection was ever made by Alma & Co. (R. 306, 352) and they confirmed the next statement of account as regular in all respects. (R. 734)

Petitioner's Points II and III are irrelevant because they are not in line with the facts as proved and as found by the court, and are without merit.

POINT III

As to Waiver by the Plaintiff.

This is in answer to Plaintiff's Point IV. It presents the only point which has not already been argued in plaintiff's previous unsuccessful application for a writ of certiorari.

Petitioner says (p. 15) that there is nothing in the record to the effect that it "chose to demand unequivocal and immediate return of all pledged bonds," that "defendants *merely* requested that the bonds should not be sold" and that "the *only thing* petitioner did was to ask the defendants to join in a common agreement." These statements are untrue.

In its letter of March 24, 1932, plaintiff's attorneys said (R. 32, Plf's Ex. 8): "We are instructed to inform you that the sale of these bonds is protested on the

specific grounds *that you have not acquired any title* to these bonds and *cannot acquire any title* thereto which can diminish the paramount sovereign rights of the Province of Upper Austria, without its consent; and *that there is no jurisdictional basis for any lawful foreclosure proceedings of any alleged lien on these bonds in your favor by judicial or extrajudicial means,* without the consent of the Province."

Again, in the undated letter of about April 24, 1932, written by plaintiff's representatives it was stated (R. 34, 35, Plf's Ex. 9): "The undersigned hereby *demands the delivery* of these bonds to it, and *again* informs you that *it will not meet the coupon and sinking fund service thereon, nor pay the same at maturity to you or to anyone claiming through you.*" (Italics ours)

Further comment seems unnecessary. Petitioner's Point IV is without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: August 22, 1940.

A. Spotswood Campbell,
Attorney for Respondents.

Karl T. Frederick,
Counsel.